Supreme Court, U.S.
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NO. 90-1282

(4)

SUPREME COURT OF THE UNITED STATES
October 1990 Term

REHAB AMER and AHMED AMER,

Petitioners

v.

DEPARTMENT OF SOCIAL SERVICES,

Respondent

PETITIONERS' REPLY BRIEF

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REPLY OF PETITIONER

Counsel for Respondent Children, William E. Ladd, but not the Attorney General, challenges the jurisdiction of this Court at page (1) of his Brief by stating:

" First, petitioner's question relating to the two different burdens of proof applied at the various stages of the juvenile court proceedings (Petitioner's Question I, 1) was never presented by petitioners in the state court, either at the trial court or appellate level. Further the issue was not addressed by the Michigan Court of Appeals in its decision below."

This statement misleads this Court. All the constitutional issues raised in the Petition for Certiorari were raised not once, but not less than four times before the appellate courts of Michigan. The Petitioners' Court of Appeals Brief below at page 7,10,14,25,28, 33 and 35-38, raised the Due Process and findings

questions (see Petition for Certiorari "Question I.1."), and, at pages 38-40 the coerced confession issue ("Question I.2.") The Petition before this Court is essentially the same as the brief filed before the Court of Appeals. For example, Petitioners' Michigan Court of Appeals Brief stated:

> "After referring to the first placement of Samier in foster care in 1984 (T 1/19/89 at 12-13), Judge Barsamian alluded to the preliminary hearing conducted by Probate Judge Martin Maher which had concluded in 1986, almost a year after Samier's death. She stated that Judge Maher had determined "that Samier Amer was killed." (T 1/9/89 at 14).
>
> "Although Judge Barsamian refers to Judge Maher's finding during the adjudicatory phase, she does not herself provide specific evidentiary support for her conclusion that the Amers "killed" Samier. (T 1/9/89 p. 14)." (Court of Appeals Brief, Page 7)
>
> "In summary, Judge Barsamian's decision relied on Judge Maher's finding made at the adjudication preliminary phase of this proceeding. She also emphasized that the Amers refused to confess to a killing which she intuitively knew had been intentionally perpetrated by one or the

other. She presumed that a confession of guilt is absolutely indispensable for the safety of the children should they be returned, and she assumed that anything else indicating the Amers are capable parents, psychologically sound, love their children, have exhibited extraordinary dedication and are fighting for their lives is inconsequential. She apparently assumed that proper efforts were made to reunite this family. She assumed that the best interest of these children would be served by severing their ties to their parents and to their heritage.

During the termination hearing, Judge Barsamian would allow no testimony about discrimination against the Amers because of their ethnic background (a-38); would not listen to or admit into evidence tapes of the interaction between the Amers and their children; she would not talk to the children (T 12/15/88 1443-1445) would not allow questions about alienation of the children from their parents (T 12/16/88 at 1519-1523); refused to order neutral conjoint evaluation as requested by motion (a-37); would not allow any testimony about the competency of the Clinic for Child Study report of 1988 (T 12/16/88 at 1540-1542); and would not let the Amers' expert Dr. Gordon Blush, a psychologist with extensive experience, (T 6/6/88 Exhibit Two) to testify about the psychological effect of permanent parental termination upon the emotional well being of the children. (T 12/16/88 at 1533-1534)

Most importantly, when counsel for the Amers attempted to question Ahmed Amer about the death of Samier, the Court said:

"I agree with Mr. Ladd on the whole in terms of the matter has been adjudicated, findings of fact have been made." (T 12/15/88 at 1376).

Judge Barsamian did not articulate or recognize a distinction between the jurisdictional hearing, the statutory hearing, or the termination hearing with respect to statutory criteria or burdens of proof.
(Court of Appeals Brief, Page 10)

The Probate Court did not distinguish between a preliminary hearing and one for termination. "A distinction exists between evidence which would support an order of temporary custody by reason of neglect and evidence necessary to support a permanent custody order. Fritts, supra, at 113....
(Court of Appeals Brief, Page 33)

ARGUMENT IV

IF THE FINDINGS AND EVIDENCE BELOW ARE SUFFICIENT UNDER MICHIGAN LAW TO WARRANT PERMANENT TERMINATION, THEN THE ORDER OF TERMINATION AND SECTION 19(e) AND (f) ARE IN VIOLATION OF DUE PROCESS OF LAW UNDER THE CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV AND THE MICHIGAN CONSTITUTION,

ARTICLE 1, SECTION 17.
(Court of Appeals Brief,
Page 35)

In Santoskey v. Kramer, 455 US 745; 102 S Ct. 1388; 71 L Ed 2d 599 (1982), the United States Supreme Court held that: "Before a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the state support its allegations by at least clear and convincing evidence." 102 S Ct. at 1391-92. This result flowed from the "Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." Id at 1394."
(Court of Appeals Brief, Page 35-36)

Furthermore the Court of Appeals Brief of the Respondent Attorney General addressed the findings issue as follows:

"In the instant case, the judge made extensive findings of fact. (T., pp. 1714-1735). The judge relied upon the lengthy testimony taken from numerous witnesses, exhibits and the court's file which contained the findings of fact and conclusions of her predecessors, Judge Maher and Referee McKnight. (T., pp. 1715). The court as required by MCR 5.974(G) made brief, definite and pertinent findings and conclusions on the contested matters. Judge Barsamian in adopting Judge Maher's findings, essentially found that the respondents could not provide a fit home for the

children given the court's "experience with them relative to the child Samier". (T., p. 1733)."
(Court of Appeals Brief, Page 3)
(emphasis added)

Mr. Ladd also recognized the same issues in his Court of Appeals Brief.

"It is clear from the court's findings that the history of the family's involvement with the court was significant. This consideration was legally proper, given that all proceedings under the Juvenile Code are considered to be one continuous proceeding. In the Matter of Sharpe, 68 Mich App 619 (1976). This earlier history was significant for a number of reasons. First, because it supported the conclusion, made at the adjudication before Judge Maher, that the child Samier Amer had been killed by one of the parents. Second, the history of the case, leading up to the death of the child, demonstrated to the court that certain approaches to therapy could not work with these parents. The court answered an argument made by parents' counsel:"
(Court of Appeals Brief, Page 2)
(emphasis added)

"The United States Supreme Court, in Santosky v. Kramer, 455 US 745, 71 LEd 2d 599; 102 SCt 1388 (1982), mandated that, as a matter of federal constitutional law, a termination of parental rights must be supported by clear and convincing evidence...

"Appellants argue that their due process rights were violated because the Juvenile Court relied on two irrebuttable presumptions in terminating the parents' rights... These facts established that the parents abused and neglected their children. (Adjudication, 10/28/86, 382, 392.) Such findings can reasonably be considered to be findings that the parents home was unfit. See In re Futch, 144 Mich App 163 (1983).

When the case went to hearing on the permanent custody petition, the issue was not whether the death of the child established the parents' continuing lack of fitness, but rather whether the efforts made to rehabilitate the family had been sufficiently successful to render the home safe for the return of the children. (T, 1731-1732)."
(Court of Appeals Brief, Page 15)

Finally, at the oral argument before the Court of Appeals panel on March 6, 1990 Petitioners' argument, and the Court's concern were almost exclusively directed to the due process arguments concerning improper reliance by the Probate Court at the termination hearing on findings made at the earlier hearings where the burden of proof was

preponderance and not clear and convincing evidence. The Respondents also addressed these arguments, conceding that Judge Barsamian had indeed relied on the findings of Judge Maher and Referee McKnight as to the cause of death of Samier. The confession issue was also addressed by counsel and the Court of Appeals panel.

The Court of Appeals entertained, decided and denied each of Petitioners constitutional arguments. Neither adequate state grounds or failure to raise federal questions below bar this Court from determining these questions. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928): Orr v. Orr, 440 U.S. 268, 274-75 (1979); Caldwell v. Mississippi, 472 U.S. 320, 326-328 (1984). See in general, Stern, Gressman, Shapiro Supreme

Court Practice, Sec. 3.22.

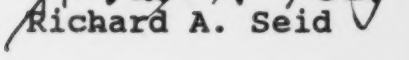
Insofar as Mr. Ladd alludes to the necessity for prompt resolution of the fate of the Amer children, it was the State which caused temporary foster care to exist for 4 years; it was the State judiciary which would not act more promptly despite repeated motions for it do so; and it was Mr. Ladd who asked for two extensions of time within which to file his Court of Appeals Brief.

More importantly, there is no proof before any court that the return of these children to their rightful biological parents would be harmful at all even at this late date. We properly should assume that children are benefitted when returned to their parents. Michigan law does not provide for termination of parental rights in the best interest of children.

Conclusion

This Court has jurisdiction to decide the Constitutional issues raised by the Petition and certiorari should be granted.

Respectfully submitted,



Richard A. Seid

Dated: March 22, 1991